SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 223

JAMES C. DAVIS, AGENT, PETITIONER,

vs.

ABRAHAM WEISS, ADMINISTRATOR, RESPONDENT.

RESPONDENT'S BRIEF.

JOHN W. KEITH,
BENJAMIN RABALSKY,
Attorneys for Respondent.

INDEX.

CASES CITED.

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RESPONDENT'S BRIEF.

This case is reported below in 250 Mass. 12.

The questions presented by this petition are three in number.

1st. Was the agent of the railroad administration rightly substituted, as party defendant in the place of the original corporate defendant.

2d. Whether the action was barred against the agent by the requirement of the bill of lading that suit be brought within two years and one day from a reasonable time for delivery of the property, the latter date being in 1918, and substitution being made in January 23d, 1922.

3d. Whether under the United States Revised Statutes, section 3477, the action may be maintained on an assignment of a claim against the United States Railroad Administration.

These are the questions as presented by the petition for certiorari granted January 26, 1925.

The rights of the respondent, the plaintiff below, are to be found in the Act of August 29, 1916, 39 Stats. at L. 645, and the proclamation thereunder, December 26, 1917; Federal Control Act, March 21st, 1918, 40 Stats. at L. 451, General Order 50; Transportation Act 1920, 41 Stats. at L. 1789, and Act of March 3d, 1923, 42 Stats. at L. 1443. The Act of August 29, 1916, gave the President power to take possession and control of any system of transportation for war purposes. The proclamation thereunder provided that suit may be brought by and against said carrier and judgment ordered as heretofore, until and except so far as said Director may by general or special order otherwise determine.

The right to sue is contained in the proclamation of December 26, 1917, and in section 10 of the Federal Control Act, as follows:

> Sec. 10. Carriers while under Federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws, or Common Law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to the Federal control, or with any order of the President. Actions at law, or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law."

Wherever by either the common law or statute law of a State a right of action has become fixed and a legal liability

incurred that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

Miller, J., in Dennick *vs.* R. R. Co., 103 U. S., 11.
Bigby *vs.* U. S., 188 U. S., 400.
Davis *vs.* Sloane, 263 U. S., 158.

Prior to the decision of this court in Mo. Pac. R. R. Co. *vs.* Ault, 256 U. S., 554, the Federal Control Act has been before the courts in at least twenty-eight cases.

Of the twenty-eight cases, Mardis *vs.* Hines, 258 Fed. 945, Dahn *vs.* McAdoo, 256 Fed. 549, Haubert *vs.* B. & O. R. R. Co., 259 Fed. 351, Nash *vs.* So. Pac. Co., 260 Fed. 208, and Westbrook *vs.* Director General, 263 Fed. 211, were the only authorities that at that time had decided that suits should not be brought against the carrier, but should be brought against the Director General; all the others had decided that the suit was properly brought against the carrier.

As was said by Rugg, Chief Justice, "This action was brought against the railroad, according to a widely prevailing though erroneous view of the profession as to the proper defendant under the Federal control."

The weight of authority at that time sustained the act of counsel in commencing suit against the carrier, New York, New Haven & Hartford Railroad Co.

Rights were also given by General Order Number 50, and in that order it is provided:

> "The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier, on a cause of action arising since

> December 31, 1917, based upon a cause of action, arising from, or out of the operation of the railroad, or other carrier, may on application be amended by substituting the director general of the railroad for the carrier company as party defendant, and dismissing the company therefrom."

General Order 50A, does not change in any way what is quoted above from general order number 50.

Rights of the respondent herein, plaintiff below, are further given by the Transportation Act of 1920, that act in Section 206A provides:

> "Actions at law, suits in equity, proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916) of such a character as prior to Federal control could have been brought against such carrier, may after determination of Federal control be brought against an agent designated by the President for such purpose, such actions, suits or proceedings may * * * be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier."
>
> "206. (D). Actions, suits, proceedings, and reparation claims of the character above described pending at determination of Federal control shall not abate by such determination but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision A."

By an act approved March 3d, 1923, 42 Stat. at L. 1443, chapter 233, Congress amended the transportation act by adding two new subdivisions:

"(II). Actions, suits, proceedings, and reparation claims of the character described in subdivision (A) (C) (D) properly commenced within the period of limitation described and pending at the time this subdivision takes effect shall not abate by reason of the death, resignation, or removal from office, of director general of railroads, or the agent designated under subdivision (A), but may (despite the provision of the act entitled 'An act to prevent the abatement of present actions, approved February 8, 1899') be prosecuted to final judgment, decree or award substituting at any time before satisfaction of such final judgment, decree or award the agent designated by the President then in office."

"(I). Orders providing for a substitution in such cases, made before this subdivision takes effect by courts having jurisdiction of the parties and subject-matter are hereby validated anything in such act of February 8, 1899, to the contrary notwithstanding."

It is submitted that the plain purpose of the foregoing acts of Congress is to preserve all rights of persons injured by the negligence of the carrier while under the control of the Director General, suit being brought against the Director General.

When the report of the committee to whom had been referred the bill—H. R. 14308—was made to the house a letter from James C. Davis, Director General, the petitioner herein, was annexed to the report in which Mr. Davis used the following language:

"My Dear Mr. Winslow:

"I have carefully examined the provisions of H. R. 14308, an act amending section 206 of the Transportation Act of 1920.

"The proposed legislation has the entire approval of the railroad administration. In liquidating the claims growing out of Federal control, necessarily much litigation, arising out of disputed liability in the matter of personal injuries, loss and damage, fire, etc., has arisen.

"These provisions seem to be just, and in any cases to which they apply the Government has had, or will have the privilege of defending on the merits.

"I therefore see no reason why the proposed legislation should not be enacted.

"Yours truly,

"JAMES C. DAVIS,
"Director General."

That an act passed after the event, which in effect ratifies what has been done, is valid so far as Congress could have conferred such authority before admits of no reasonable doubt.

Miller, J., in Mitchell *vs.* Clark, 110 U. S. 633.
Davis *vs.* Lewis, 288 Fed. 704.

Where a State descends from the plane of sovereignty and contracts with private persons it is regarded *pro hac vice* as a private person itself, and is bound accordingly.

Swayne, J., in Hall *vs.* Wisconsin, 103 U. S. 5.

This last act of March 3, 1923, validated the substitution made January 23, 1922, and that substitution was within the two years allowed by the Transportation Act, the two years named therein not expiring until February 28, 1922.

Where a person has acquired a claim against the Government of an equitable, moral, or honorable nature, the Na-

tion, speaking broadly, owes a debt to an individual when his claim grows out of right and justice—the power of Congress extends to the payment of such debts.

U. S. *vs.* Realty Co., 163 U. S. 427.

U. S. *vs.* Cook, 257 U. S. 523.

The Federal Control Act gives a new right, but does not describe or prescribe any exclusive remedy; in such case the common law will furnish an adequate remedy.

The jurisdiction of the State court to try and determine this cause of action cannot be doubted.

Clafflin *vs.* Houseman, 93 U. S. 130.

Robb *vs.* Connelly, 111 U. S. 624.

Mondou *vs.* N. Y., N. H. & H. R. R. Co., 223 U. S. 1.

Galveston H. S. A. R. Co. *vs.* Wallace, 223 U. S. 481.

The rule laid down by this court in the case last cited is as follows:

"LAMAR, *J.*:

> "Where the statute creating the right provides an exclusive remedy to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statutes which created the right. But jurisdiction is not defeated by implication. And considering the relation between the Federal and State governments, there is no presumption that Congress intended to prevent the State courts from exercising the general jurisdiction already possessed by them, and under which they already had the power to hear and decide causes of

> action created by Federal statutes. On the contrary, the absence of such provisions would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a State court as well as in those of the United States. This presumption would be strengthened as to a statute like this passed not only for the purpose of giving a right, but of affording a convenient remedy."

In Penn. R. Co. *vs.* Puritan Coal Co., 237 U. S. 121, a case under the Commerce Act, 24 Stats. at L., 380, chapter 104, Lamar, J., says:

> "The act was both declaratory and creative. It gave shippers new rights while at the same time reserving existing causes of action."

So, under the Federal Control Act, that act gave new right, but left the whole question here involved to be tried in any court that obtained jurisdiction of the parties. In the present case there is only a claim of damages occasioned by the negligence of the carrier. State and Federal courts have concurrent jurisdiction of such a claim.

The Federal Control Act expressed the consent of the sovereign power to see full justice done under the circumstances of this case.

U. S. *vs.* Thompson, 257 U. S. 419.

The Federal right is enforceable in a State court wherever the ordinary jurisdiction as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws. The grant of concurrent jurisdiction implies

that in the first instance the plaintiff shall have the choice of the court. As an incident he is entitled to whatever the remedial advantage inheres in the particular forum.

State *ex rel.* St. B. & M. Ry. Co. *vs.* Taylor, 266 U. S. 201.

Furthermore, the Congress contemplated suits in State courts and accepted State procedure in advance. We see no reason why it should be supposed to have excluded ordinary incident of states procedure.

Holmes, J., Dickinson *vs.* Styles, 246 U. S. 631.

With what functions the State courts may be invested is a matter of State law and not of Federal concern. It is also a matter of construction in which the decision of the State court will be followed by a Federal court.

Freeport Water Co. *vs.* Freeport, 180 U. S. 587.

It is submitted that the rule of court procedure and rules of practice in the State court of Massachusetts governed the court therein when passing upon the question of amendment and substitution.

State Procedure.

The law of Massachusetts in relation to amendments is now contained in the General Laws, chapter 231, section 51, as follows:

> "The court may at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party, or changing the form of the action and may allow any other amendment in matter of form, or substance, in any process, pleading or procedure.

which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enabling the defendant to make a legal defense."

This has been the law in Massachusetts since 1852, a period of more than seventy years. The substitution permitted by the State court was justified by the statute of Massachusetts.

McLaughlin *vs.* West End St. R. R. Co., 186 Mass. 150.

Ætna Mills *vs.* Director General, 242 Mass. 255.

Gonga *vs.* Director General, 243 Mass. 101.

Practice in the courts is based on local statutes and we (Supreme Court of the United States) are not disposed to revise the decision of the Supreme Court in such cases.

Armeyo *vs.* Armeyo, 181 U. S. 558.

English *vs.* Arizona, 214 U. S. 359.

County Commissioners *vs.* New Mexico, 215 U. S. 296.

The elementary rule is that amendments are within the discretion of the trial court and are not susceptible of review or error except for a clear abuse.

Royal Ins. Co. *vs.* Miller, 199 U. S. 353.

Gormley *vs.* Bunyan, 138 U. S. 623.

Kinney *vs.* Columbia S. & L. Association, 191 U. S. 78.

The determination of matters of pleading ordinarily rests with the State tribunal even if the rights there in force are created by Federal law.

Brandeis, J., in Lee *vs.* Cent. of Ga. Ry. Co., 252 U. S. 109.

An amendment after the statute of limitation has run which leaves the cause of action unchanged is rightfully allowed.

Fidelity Tr. Co. *vs.* Dubois Electric Co., 253 U. S. 212.

There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleading, rules of evidence, and the statute of limitations—depend on the law of the place where the suit is brought.

Ct. Vt. R. Co. *vs.* White, 238 U. S. 507.

The decision of a State court as to what constitutes the commencement of a suit in that court is not reviewable in the Supreme Court.

Miller, J., in Richmond M. Co. *vs.* Rose, 114 U. S. 576.

Renaud *vs.* Abbot, 116 U. S. 277.

Matters of local practice do not concern us and are not open for review in the Federal Supreme Court.

Washington *vs.* Miller, 235 U. S. 422.

Holmes, J., in Ferryman *vs.* Woodard, 238 U. S. 148.

Price *vs.* Illinois, 238 U. S. 446, page 451.

A party to an action has no vested right to have a case decided and determined upon a form of procedure which may have been inadvisedly or mistakenly chosen. The evidence may show a substantial variance between the allegations and

the proof and at the same time disclose a legal right which the court in its discretion may make available and valuable by the allowance of an amendment in matter of form or substance.

Stevenson, Admr., *vs.* Nichols, 157 U. S. 370.
Brainerd *vs.* Buck, 184 U. S. 99.
Pizer *vs.* Hunt, 250 Mass. 498.

The decision of a State court upon questions of State law is not subject to review by the Federal Supreme Court.

The Winnebago, 205 U. S. 354.

Limitations.

A statutory limitation for the commencement of an action does not prevent the petition or complaint from being amended after the expiration thereof where no independent cause of action is introduced.

Blanchard *vs.* L. S. & M. S. R. Co., 126 Ill. 416.
Texas and P. R. R. Co. *vs.* Cox, 145 U. S. 593.
A. & P. R. Co. *vs.* Laird, 164 U. S. 393.
Missouri, K. & T. R. Co. *vs.* Wolf, 226 U. S. 570.

In the case last cited Pitney, J., says:

> "The argument for reversal rests wholly upon the mode of procedure followed in the circuit court. In Amr. Co. *vs.* Birch, 224 U. S. 547, there was no effort to amend by joining or substituting the personal representative and this court by reversing the judgment did so without prejudice to such rights as the personal representatives might have. Nor do we think that it was equivalent to the commencement of a new cause of action, so as to render it subject to the two years' limitation prescribed by section six of the Employers' Liability Act. The change was in form

rather than in substance. It introduced no new or different cause of action nor did it set up any different state of facts as a cause of action and therefore it related back to the beginning of the suit."

The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby, but this rule applies only to an amendment which does not create a new cause of action.

White, J., in U. P. R. Co. *vs.* Weiler, 158 U. S. 851.
A. & P. R. Co *vs.* Laird, 164 U. S. 393.
Underwood Cont. Co. *vs.* Davies, 287 Fed. 776.

The cause of action was the loss and non-delivery of the goods named in the bill of lading, and the plaintiff below intended to bring his action against the person liable for the injury. The cause of action was the same throughout the entire litigation.

Cormier *vs.* Brock, 212 Mass. 292.

The amendment of January 23, 1922, did not introduce a new cause of action.

Dahn *vs.* Davis, 258 U. S. 421.

The amendment merely expanded or amplified what was already alleged in support of the cause of action, already asserted, and was not affected by the lapse of time. The facts constituting the tort were the same whichever law gave them effect.

N. Y. C. & H. R. R. Co. *vs.* Kinniy, 260 U. S. 340.
Brainerd *vs.* Buck, 184 U. S. 99.

The introduction of the new defendant was an elongation of the original action and not the institution of a new suit.

Kearney *vs.* Dunn, 15 Wall. 51.

The authority of a court to make new parties to a suit especially after judgment or decree rests in its sound discretion, which, except for abuse, can not be reviewed on appeal or a writ of error.

Clark, J., U. S. ex rel. La. *vs.* Jack, 244 U. S. 397.

Congress can by subsequent legislative enactment and ratification make that action legal that was originally defective for want of legal sanction whenever it could have authorized the action in the first instance.

Bowles *vs.* Brimfield, 120 U. S. 759.

Roberts *vs.* No. Pac. R. R. Co., 158 U. S. 1.

That is what Congress did in enacting the Winslow Act.

This court rarely disturbs local decision on questions of local practice.

Holmes, J., in Sanford *vs.* Ainsa, 228 U. S. 705.

A.

Subdivision (F) of Section 206 of the Transportation Act provides:

> "The period of Federal control shall not be computed as a part of the periods of limitations in action against carriers or in claim for reparation to the commission for causes of action arising prior to Federal control."

This court has construed subdivision F to mean that subdivision F does not apply where the cause of action has been barred before the Transportation Act took effect.

The cause of action in the case at bar arose early in December, 1918, and the writ was sued out May 15, 1919.

The substitution was made January 25, 1922, and the appearance of the petitioner as defendant herein was on February 13, 1922. *The limitation named in the bill of lading, to wit, two years and a day, did not expire until December 1, 1920.*

Records, pages four, six, eight, and nine.

Under Section 206 of the Transportation Act, which took effect March 1, 1920, a period of two years was allowed for the purpose of commencing suit against the agent named by the President.

At the time of the taking effect of the Transportation Act, the claim here in suit *had not and could not have been barred,* for nine months more had to run before the limitation named in the bill of lading could have expired. Under the construction of subdivision F by this court, *this cause of action was not barred when the substitution was made.* The facts in this case are in exact converse to the rule laid down by this court in

Fullerton-Kruger L. Co. *vs.* No. Pac. R. Co., 263 U. S. 435.

Danzer & Co. *vs.* Gulf and S. I. R. Co., Adv. Ops. Sup. Ct., 69 L. Ed. 720.

Under the provisions of Section 206 of the Transportation Act and of the Winslow Act a substitution in this case was rightly made.

Davis *vs.* Lewis, 288 Fed. 704.

Davis *vs.* Preston, 264 S. W. 331.

Kilgore *vs.* Hines, 265 S. W. 744.

Service of Process.

Due and sufficient service of the summons upon Davis, agent, the petitioner herein, was made.

Report, page four.

Transportation Act, Section 206 (B).

Vicksburg, S. & P. R. Co. *vs.* Anderson Tulley Co., 256 U. S. 408.

In the case at bar the appearance for the petitioner herein was in these words:

> "The clerk will please enter my special appearance for the defendant Davis for the purpose of contesting jurisdiction.
>
> "A. W. BLACKMAN,
> "*Atty., Appearing Specially.*"

Record, p. 6.

The legal effect of such a pleading was clearly stated in Phillips *et al. vs.* Davis, 147 N. E. 96.

"RUGG, C. J.:

> "The motion to dismiss for want of jurisdiction was rightly disallowed in the district court. The special appearance had no other effect than to enable Mr. Hines to raise the question here argued. That being rightfully overruled, his participation in the trial on the merits in the district court, protected his every right."

B.

The Municipal Court of the City of Boston would have had jurisdiction of the Director General of Railroads if he had been properly made a party. It also had jurisdiction

over the cause of action whether the alleged wrong was committed by the railroad or by the Director General of Rail roads.

Lonegan *vs.* American Ex. Co., 250 Mass. 30.

The respondent respectfully submits that the substitution in the case at bar by the Municiapl Court of the City of Boston was rightly made.

The Claim that the Assignment is Null and Void.

This claim is based on Section 3477, Revised Statutes of United States. That section is as follows:

> "All transfers and asignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payments of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfer, assignment, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgment of deed and shall be certified by the officer, and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney, to the person acknowledging the same."

This statute was first enacted in 1853 and the title of the act is "To prevent fraud on the Treasury."

10 Stats. at L. 170.

This statute is not to be interpreted according to the literal acceptance of the words used.

U. S. *vs.* Gillis, 95 U. S. 407.
Erwin *vs.* U. S., 97 U. S. 392.
Goodman *vs.* Niblack, 102 U. S. 556.
Bailey *vs.* U. S., 109 U. S. 432.

This statute applies only to such claims as require allowance by some accounting officer, an ascertainment of the amount due thereon and the issue of a warrant for their payment.

22 Op. Atty. Gen'l. 637.

This section refers only to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment or may be prosecuted in the court of claims.

This section was intended solely for the protection of the Government and its officers during the adjustment of claims.

Hobbs *vs.* McLean, 117 U. S. 567.
Ball *vs.* Hallsell, 161 U. S. 72.
McGowan *vs.* Parish, 237 U. S. 285.
Houston *vs.* Ormel, 252 U. S. 469.
Western Pac. R. Co. *vs.* U. S., Adv. Op. Sup. Ct., 69 L. Ed. 569.

The Revised Statutes of the United States, 3477, is in direct conflict with Section twelve of the Federal Control Act.

Section twelve provides as follows:

"Money and other property derived from the operation of the carriers during the Federal control, are hereby declared the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control. Disbursement therefrom shall without further appropriation be made in the same manner as before Federal control."

A claim for damages sustained for loss of property is a claim not for a penalty, but for compensation; it is a property right, assignable in its nature, and must be regarded as assignable at law in the absence of any expression of a legislative intent to the contrary.

Spiller *vs.* A., D. & S. S. R. Co., 253 U. S. 117.
Sandoval *vs.* Davis, 288 Fed. 56.

The provisions in sections twelve and ten of the Federal Control Act eliminate all of the dangers stated by Miller, J., in Goodman *vs.* Niblack, 102 U. S. 566, as liable to happen if assignment were permitted. Here there is no depletion of United States Treasury, no warrant upon the Treasury, but a determination of a legal liability under the act of Congress in a court of competent jurisdiction, and the payment, if made, is made without appropriation from the Treasury, but from the funds in the hands of the carrier.

Under the law in Massachusetts, the assignee of a non-negotiable chose in action which has been assigned in writing may maintain an action thereon in his own name, but subject to all defenses and rights of counter-claim recoupe-

ment or set-off which the defendant would have been entitled had the action been brought in the name of the assignor.

Gen. Laws, chapter 231, Section 5.

This court, in an action arising under the Federal Employers Liability Act, stated:

> "We see no reason why it should be supposed to have excluded ordinary incidents of state procedure. We presume that it would not be contended that the Employers Liability Act prevented the assignment of a judgment under it in such form as was allowed by the Law of Minnesota, or that it allowed the defendant to disregard such assignment after notice. Nor do we perceive any different rules for an assignment of judgment or cause of action by way of security, which, under the Minnesota Statutes, contracts with Holloway brought to pass."
>
> Holmes, J., in Dickinson *vs.* Stiles, 246 U. S. 631.

Under these circumstances, the United States consented to be proceeded against.

Davis *vs.* Donovan, 265 U. S. 257.

Under the Feneral Control Act, the Director General and the United States were made liable to the persons injured by the negligence of the Director General or his agents in the operation of the carriers.

Mo. Pac. R. Co. *vs.* Ault., 256 U. S. 554.

Alabama, etc., R. R. Co. *vs.* Journey, 257 U. S. 111.

Dahn *vs.* Davis, 258 U. S. 421.

North Carolina R. R. Co. *vs.* Lee, 260 U. S. 16.

Davis *vs.* Dantzler Lumber Co., 261 U. S. 280.

Wabash Ry. *vs.* Elliot, 261 U. S. 457.

Director General *vs.* Kastenbaum, 263 U. S. 25.
Seymour *vs.* Director General, 290 Fed. 291.
Boswick *vs.* Director General, 220 Michigan 21.
Standard Oil Co. *vs.* Payne, 220 Mich. 663.
Davis *vs.* Wolfe, 263 U. S. 239.
Davis *vs.* Slocum, 263 U. S. 158.
Vicksburg, S. & P. Co. *vs.* Anderson Tulley Co., 256 U. S. 408.
Hudson *vs.* Davis, 289 Fed: 943.
Manbur Coal Co. *vs.* Davis, 297 Fed. 24.
Davis *vs.* McCree, 299 Fed. 142.
Davis *vs.* Michigan Trust Co., 2 Fed. (2d) 194.

The construction of section 206 of the Transportation Act for which the petitioner here contends, namely, that it permitted the substitution of the agent designated by the President only in suits properly brought and pending at the termination of Federal control, it is respectfully submitted, is not warranted by the clear comprehensive language of the act and with the purpose of the act to settle all matters arising out of the operation of Federal control all through this country. This, it is submitted, is clearly shown by the passage of the Winslow Act, amending Transportation Act, Section 206.

Davis *vs.* Lewis, 288 Fed. 704.

The precise question under the claim that the assignment was null and void has been passed upon in the following cases and decided in favor of the respondent:

Paradine, L. & L. Stock Co. *vs.* Davis, 60 Utah, 189.
Morgan *vs* Hines, 65 Montana, 306.
Parrinton *vs.* Davis, 285 Fed. 741.

Goodwin Preserving Co. *vs.* Davis, 258 Southwestern 97.

Mechanics B. & Tr. Co. *vs.* Knoxville, S. & E. Ry. Co., 148 Tenn. 113.

The petitioner relies upon the case of Davis *vs.* I. L. Cohen & Co., Inc., decided in this court June 8, 1925, and reported in Adv. Ops., 69 L. Ed. 702.

The respondent submits that the decision in that case does not settle the questions involved in the case at bar. The one question in the Cohen case which bears upon the present case is the decision that the substitution could not be made after the time named in the Transportation Act, in 206 (A), had expired.

In the case at bar the substitution was made and the appearance for the petitioner in the court below was made February 13, 1922. Record, page 6.

The court in its opinion apparently relies upon Davis *vs.* Chrisp, 159 Ark. 395; Fahey *vs.* Davis, 224 Mich. 371; Fischer *vs.* Wabash R. Co., 235 N. Y. 568; Currie *vs.* Louisville & N. R. Co., 206 Ala. 402, and Davis *vs.* Industrial Commission, 350 Ill. 341.

There are marked differences between the five cases above and the case at bar.

In the Arkansas case, which was a claim under the Federal Employers' Liability Act, the action was brought against the railroad company four years after the cause of action accrued, and under that act the claim must be commenced within two years from the day the cause of action accrued, and the court further says in that case that the provision in the Transportation Act has no application under the Federal Employers' Liability Act, and that the Court was follow-

ing the previous decision of the Court under the Arkansas Statutes of Amendment. In Fahey *vs.* Davis, the claim was also under the Federal Employers' Liability Act, and that suit was not commenced within two years from the time the cause of action arose. In Fisher *vs.* Wabash Railway Co. the question whether the substitution of James P. Davis introduced a new party was not answered at all by the Court of Appeals in New York, and it further appears that the substitution attempted was too late under the terms of the Transportation Act.

The case of Currie *vs.* Louisville Railroad was decided under the Statutes of Amendment in Alabama, and the court in its opinion says that the amendment proposed would offend our amendment law.

In Davis *vs.* Industrial Commission the motion to amend was too late under the terms of the Transportation Act. In no one of the above cases was the Winslow Act called to the attention of the court, and the court has made no decision as to the effect that the Winslow Act has upon the case at bar.

Where the Winslow Act has been brought to the attention of the court the decision of the court has been in favor of the respondent herein.

Davis *vs.* Preston, 264 S. W. 331.
Kilgore *vs.* Hines, 265 S. W. 944.
McDaniel *vs.* Davis, 266 S. W. 710.
Davis *vs.* Lewis, 288 Fed. 704.

The respondent respectfully submits that the judgment of the Court below should be affirmed.

By His Attorneys, JOHN W. KEITH,
BENJAMIN RABALSKY.